

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
AUSTRALIAN FEDERAL POLICE

Senator Humphries asked the following question at the hearing of 29 August 2012:

Perhaps the AFP could also present some cases where you can describe to us the factual situations but tell us where the law broke down, where the state of the law was insufficient to secure a conviction when one ought to have been secured.

Senator HUMPHRIES: We still have the question in front of us about the extent we need to beef-up the law in order to capture people who are doing the wrong thing now but who are escaping the arm of justice, because of the way the law is drafted. To help us answer that question, I would like you, perhaps Ms Hinchcliffe, to take on notice the task of putting in front of us some cases that the DPP has handled. *Perhaps the AFP could also present some cases where you can describe to us the factual situations but tell us where the law broke down, where the state of the law was insufficient to secure a conviction when one ought to have been secured.*

If there were a case of a witness who suddenly went cold or disappeared or went back to China or somewhere, that does not help me very much. I want to know of cases that have been considered, or have actually been commenced, which have failed because of a flaw in the state of the law. I am looking here at the evidence of people like the Scarlet Alliance who say that there are already laws to deal with slavery and slavery-like offences. The prosecution brought under those provisions may claim that there is not any evidence that there is a deficiency in the law at the moment. I want you to prove them wrong. That is what I am asking you to do.

Ms Hinchcliffe: I am happy to take that on notice. Often there is a mixture of the issues I have just described in terms of the evidence that is available and the complexity of the offences as they are.

The answer to the honourable Senator's question is as follows:

Organ trafficking

The AFP investigated its first organ trafficking case in 2010. No charges were laid as CDPP advised the AFP there was insufficient evidence to support a prosecution for a Commonwealth people trafficking offence.

This matter involved an alleged attempted removal of an organ. The victim allegedly travelled from the Philippines to Australia for the purposes of donating a kidney to a NSW woman. The AFP understood that the victim had consented to the removal and had been promised money and a visa in exchange. There was strong evidence of recruitment, travel and preparatory tissue matching. The victim came forward to police just prior to the operation occurring, having changed her mind about the removal. The organ was not ultimately removed.

Currently, where a person is brought to Australia for the purpose of organ removal and they consent to the removal, this will only constitute a trafficking offence if it is an offence to remove the organ in the jurisdiction where the procedure takes place. As removal of an organ is not currently, by itself, an offence in NSW, this requirement could not be made out.

The amending Bill will expand the circumstances in which trafficking a person who consents to the removal of an organ will constitute a Commonwealth trafficking offence. This behaviour will be criminalised if it is illegal to enter into an agreement for the removal in the relevant State or Territory where the removal would be carried out. These legislative amendments would assist the prosecution of a case based on similar facts where it is not an offence in the State to remove the organ but it is an offence in that State to enter into an agreement to remove an organ.

Servitude and forced labour

The current legislative framework does not criminalise forced labour unless it is connected to the offence of trafficking and servitude offences are currently limited to sexual servitude. Exploitation of victims in industries outside of the sex industry can be difficult to prosecute where the exploiter is not involved in the trafficking of the victim.

The introduction of a stand-alone forced labour offence and servitude offences which reach beyond the sex industry will ensure that this type of exploitation is captured when it is disassociated from the trafficking.

In 2009, the AFP became aware of a man who had subjected a victim to serious exploitative conditions in a restaurant. He was charged with a trafficking offence involving forced labour in 2010.

The victim (an Indian national) had worked for approximately 12 hours per day, 7 days a week for minimal pay. He had lived in a storeroom at the rear of the restaurant and bathed in the kitchen. He was subjected to continued physical and mental abuse, and threats directed to himself and against his family. He had limited freedom and limited access to his passport. His exploitation was compounded by his lack of education and basic understanding of English.

The facts were considered to be insufficient to amount to a slavery offence and no separate forced labour or servitude offence was available. In order to charge the defendant for the exploitation it was necessary to obtain evidence he had facilitated the trafficking of the victim.

The AFP was able to obtain evidence that the Defendant had engaged in conduct facilitating the entry of the victim into Australia and he was charged with the offence of Trafficking in persons contrary to subsection 271.2(1B) of the Criminal Code. Had it not been possible to demonstrate a sufficient connection between the defendant and the trafficking of the victim, no charges addressing the entirety of the defendant's exploitation of the victim could have been laid. The AFP could have pursued the exploiter under a forced labour or servitude offence if the amendments proposed by the Bill had been in force at that time.

The AFP is also aware of a case where a young man was held captive by a couple in the Blue Mountains for several months in 2010. Media reports allege that he was forced to perform all the cleaning duties in the home, locked in the cubby house and starved by the couple causing him to lose almost half his body weight. This matter was not investigated by the AFP, however we understand this man was an Australian citizen and had not been trafficked. Consequently the couple were not able to be charged with an offence under the current Commonwealth legislative framework as no offence of servitude (outside of the sex industry) currently exists. Exploitation by way of forced labour currently requires that the exploiter also trafficked the victim. The offenders were charged with a combination of state offences which attempted to capture the behaviours separately.

Coercion, threat or deception

The existing offences of sexual servitude and people trafficking capture situations where the victim, because of 'force or threats', is not free to cease providing services, or complies with being trafficked.

The Bill will replace references to ‘force or threats’ with a broader concept of ‘coercion, threats or deception’. These changes will capture more subtle, non-physical means by which an offender could obtain a victim’s compliance.

AFP investigations have revealed that the exploitation of many victims in Australia does not involve abduction, violence or physical restraint. Rather, offenders often use subtle, non-physical means to obtain a victim’s compliance such as deception, abuse of power or of a position of vulnerability, social isolation and financial controls. Despite being used to obtain a victim’s compliance, these types of coercive conduct would not currently fall within the concept of ‘force or threats’.

The AFP is aware of matters that have been investigated as sexual servitude where the circumstances described by the victims were considered to be insufficient to amount to an actual or implied threat. Statements from the workers to police indicated that they felt that they could not “say no” to performing sexual services when they were unwell and did not wish to continue. The workers were also under the impression that they could not take a day off even if they wanted to. Prior to leaving their home country, the workers were informed they would have to pay off a debt from their earnings made through performing sexual services in Australia. When they arrived in Australia they were advised of additional debts they would need to satisfy. Depending on the facts of the case, these types of financial and psychological pressures may satisfy the new broader concept of coercion.

Harbouring

The Bill creates a new standalone offence where the offender harbours, receives or conceals a victim and is reckless as to whether that behaviour assists another person (or furthers another person’s purpose) in the commission of a trafficking, slavery or slavery like offence.

The reforms will ensure that third parties who harbour, receive or conceal trafficked persons can be prosecuted.

The kinds of third parties likely to harbour or otherwise be in receipt of trafficked persons include:

- brothel licensees/managers
- spouses and business partners
- farm proprietors/managers
- industrial proprietors/managers
- employment agents/labour contractors (including agents for sex workers)
- drivers (both business and private operators), and
- accommodation providers (both business and private operators).

The AFP is aware of a number of cases in which spouses have materially assisted in the operation of a business involving servitude who could not be charged with any offence because their conduct was facilitative rather than amounting to a primary offence.

The proposed harbouring offence is intended to capture people who intentionally harbour, receive or conceal the victim and are reckless as to whether that behaviour assists or furthers another person’s commission of a trafficking offence or slavery like offence.